

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 721

Federal Credit Union Incidental Powers Activities

AGENCY: National Credit Union Administration.

ACTION: Proposed rule.

SUMMARY: The National Credit Union Administration (NCUA) is proposing a revised regulation to categorize activities deemed to be within the incidental powers of a federal credit union (FCU). The proposed rule also describes how interested parties may request a legal opinion on whether an activity is within an FCU's incidental powers or apply to add new activities or categories to the regulation. The proposed rule also clarifies the conflict of interest provisions applicable to activities authorized by this regulation.

DATES: Comments must be received on or before February 22, 2001.

ADDRESSES: Comments should be directed to Becky Baker, Secretary of the Board. Mail or hand-deliver comments to: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428. You may also fax comments to (703) 518-6319 or e-mail comments to boardmail@ncua.gov. Please send comments by one method only.

FOR FURTHER INFORMATION CONTACT: Michael J. McKenna, Senior Staff Attorney, or Chrisanthy J. Loizos, Staff Attorney, Division of Operations, Office of General Counsel at the address above or telephone: (703) 518-6540.

SUPPLEMENTARY INFORMATION:

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A. Background

On November 18, 1999, the NCUA Board (the Board) issued a request for comments in an Advance Notice of Proposed Rulemaking (ANPR) on whether the Board should restructure part 721 of NCUA's Regulations and adopt provisions regarding incidental powers within the regulation. 64 FR 66413 (November 26, 1999). At the time, the Board envisioned that it would create four sections within Part 721 and expand its test for analyzing the incidental powers of FCUs.

In the first section, the Board considered listing activities or categories of activities deemed to be within the incidental powers of FCUs. In addition to the approved activities, the Board suggested an application process for FCUs to request additional activities. Further, the Board requested that commenters offer standards for analyzing the permissibility of an activity as an incidental power, as well as examples or categories of incidental activities.

The Board suggested that the second section authorize group purchasing activities and limit compensation to the credit union's cost amount, similar to the current regulation. The Board also sought comment on the compensation limit to an FCU's cost amount, the appropriateness of a limit, and whether reasonable value be added to the credit union's cost when applying the compensation limit.

The third section considered by the Board tracked the current regulation regarding the sale of insurance products directly related to a loan or share account. Similarly, the fourth section regarding conflicts of interest tracked the current provision in part 721, but the Board sought comment on clarifying the applicability of this provision.

B. Comments

The Board received twenty-three comment letters. Comments were received from ten natural person credit unions, one corporate credit union, four national credit union trade associations, six state credit union leagues, one insurance company and one attorney. In general, the commenters supported updating the regulation. Most commenters did not specifically address the restructuring of the regulation but rather responded by commenting

individually on each of the proposed four sections.

Seven commenters opposed the regulation's structure as proposed. One commenter suggested the Board dispense with part 721 and adopt a broad policy addressing incidental powers and group purchasing. Similarly, another commenter, concerned that a single regulation may be unable to address all incidental powers, opposed defining NCUA's analysis of incidental powers in a regulation. After further consideration of the legal justifications and safety and soundness issues, as well as a review of the comment letters, the Board has decided to structure the regulation differently than presented in the ANPR. Furthermore, other laws and regulations have since supplanted some of the issues raised for comment in the ANPR. For example, the issue of mailing lists is now addressed in NCUA's new consumer privacy regulation. 12 CFR part 716.

The NCUA Board is now proposing seven sections instead of the original four sections. The Board's analysis of incidental powers is addressed in the text of the proposed regulation. The Board believes that the regulation should contain the Board's analysis so FCUs will know the criteria the Board will apply to petitions for new incidental powers.

In the ANPR, the Board addressed case law regarding incidental powers and how other financial institution regulatory agencies have addressed the issue. The Board requested comment on the standards it should consider when analyzing the permissibility of an activity under an FCU's incidental powers. The commenters overwhelmingly supported an expansion of an FCU's incidental powers. Most commenters asked that the Board adopt an analysis similar to the OCC's and advocated broad standards.

The Board requested comment on establishing a section with a list or categories of activities NCUA has approved as incidental powers for FCUs. Of the twenty-three commenters, eight supported a list of approved activities deemed to be within an FCU's incidental powers. Those in support of a list agreed with NCUA's proposal that the list would be illustrative of permitted activities and not exclusive.

Seven opposed a list of activities. Of that group, some objected to having incidental powers addressed in a regulation. The remaining commenters believed policy guidelines or regulatory commentary, in lieu of a list, would provide NCUA more flexibility. The Board believes that the use of activity categories, rather than a narrow list of permissible activities, allows for adequate illustration of the areas determined to be within an FCU's incidental powers. The Board chose not to use guidelines and commentary because they lack certainty and would not adequately illustrate what is permissible.

The Board asked for examples or categories of activities within an FCU's incidental powers. Several commenters suggested that FCUs have the incidental authority to offer stored value products or alternate media, such as gift certificates, transportation tickets, concert tickets, stamps, and phone cards. Commenters also suggested that FCUs should be able to sell advertising space on their web sites, ATM receipts, and statements. Many of the commenters' suggestions have been incorporated into the proposed regulation.

Many commenters commented on the significance of technology in the financial services industry. They suggested that FCUs should be authorized under their incidental powers to act as Internet service portals and Internet service providers, and to otherwise provide electronic financial services. Commenters also requested the ability to sell data processing services and to certify digital signatures or identifications. Again, many of these suggestions have been incorporated into the proposed regulation.

In response to the expanded powers granted to banks as a result of the Gramm-Leach-Bliley Act, many commenters discussed various types of advisory services, such as brokerage services for buying and selling insurance and investments, financial counseling, investment counseling, consumer credit counseling, estate planning, financial planning, tax counseling and preparation, and other financial or legal counseling for managing financial needs. Credit unions were not granted expanded powers as a result of the Gramm-Leach-Bliley Act but some of the commenters' suggestions traditionally have been performed by credit unions and are included in the proposed rule.

In the ANPR, the Board asked for comment on group purchasing activities. NCUA's longstanding position has been that FCUs could offer

group purchasing opportunities as a goodwill service to members. Accordingly, FCU compensation for offering group purchasing opportunities has been limited to an FCU's cost amount. One commenter suggested that the regulation should clearly distinguish group purchasing and incidental powers as two separate powers. Five commenters argued that group purchasing should be considered an activity within an FCU's incidental powers. The Board has reexamined the concept of group purchasing and has established an incidental powers activity category entitled finder activities.

The Board asked for comment on defining "insurance products" to clarify the types of products an FCU may sell to its members without compensation limits. One commenter suggested that, if the Board explicitly permits FCUs to generate income from all incidental activities, a definition would be unnecessary. In the alternative, this commenter defined "insurance products" as a product, offered by a third party, which protects the credit union or borrower against loss incurred in connection with the borrower's ability or willingness to repay an extension of credit or the credit union's level of security in the event of the borrower's default. Two commenters raised the issue of state insurance laws. Of the two, one asked that a caveat within the regulation direct FCUs to state laws governing the splitting of commissions. The second commenter stated that a definition of "insurance products" may fail to meet the same standards under various state laws and prove confusing to FCUs, resulting in violations of state insurance laws.

Currently, FCUs may provide a convenient service by offering members insurance products unrelated to an extension of credit or the opening or maintenance of a share, share draft or share certificate account. FCUs are limited to reimbursement not exceeding the greater of a nominal dollar amount or cost amount. 12 CFR 721.2(b)(2). The Board requested comment on the compensation limit of the credit union's cost amount, whether any limit is appropriate, and whether reasonable value should be added to the credit union's cost when applying the compensatory limit. NCUA also requested comment on how the term "reasonable value" should be defined.

One commenter offered definitions for both phrases. "Cost amount" was defined to include the direct cost to the FCU and reasonable related administrative costs. The commenter also offered a definition of "reasonable

value" as the greater of the FCU's actual cost or the fair market value for the services rendered in the FCU's geographic area. Five commenters stated that FCUs should be able to earn income in excess of their cost when selling insurance products to members that are not directly related to share accounts or loans.

Having considered the range of comments in response to the ANPR on group purchasing and the sale of insurance products, the Board proposes to incorporate the concept of group purchasing in regard to insurance products into the category of finder activities.

Finder activities are those in which an FCU introduces its members to third party vendors, a traditional role for financial service providers and credit unions. As a finder, the FCU assists its members in accessing products while being in the position to negotiate membership-wide rates or benefits with vendors. An FCU may act as a finder on a variety of products, including insurance products. Therefore, the Board does not need to distinguish the offering of insurance products from other types of finder activities.

The Board sought comment on whether compensation for incidental powers activities should be unlimited. Seven commenters believed that compensation should be unlimited. Some of these commenters believed that clarification was necessary. Some stated that only an FCU's board of directors should make the business decision to limit compensation derived from these activities.

Similar comments were submitted in response to the Board's query regarding the current compensation restriction of an FCU's cost amount when offering group purchasing opportunities. Eighteen commenters specifically stated that FCUs should engage in group purchasing activities without restrictions on compensation to the FCU. The commenters offered several reasons for lifting the compensation limitations. Many of these commenters believe that the amount of compensation should be a management decision. One commenter noted the laws of eight states do not restrict state-chartered credit union income for group purchasing activities. However, as the Board notes below, income from these activities is subject to tax for state-chartered credit unions.

One commenter expressed concern that income earned by FCUs under this section may be considered unrelated business income for tax purposes. The FCU Act expressly provides that FCUs are exempt from all income taxes. 12

U.S.C. 1768. Furthermore, FCUs are tax exempt organizations under 26 U.S.C. 501(c)(1) and, therefore, exempt from taxes on unrelated business income under 26 U.S.C. 511(a)(2). By finding that particular activities are within the incidental powers of FCUs, the Board, as regulator of these institutions, determines whether activities are necessary or requisite for FCUs to carry on their business effectively under the FCU Act. Under this analysis, FCUs engaging in approved incidental activities are conducting business substantially related to their business as nonprofit financial institutions.

The Board sought comment on a process for FCUs to seek approval to add activities to the regulation. The commenters offered varied responses to this request. One commenter supported an approval procedure within the regulation for activities not previously approved by NCUA. Two commenters rejected the proposal that FCUs seek approval from NCUA. One commenter suggested that NCUA regional directors accept applications and process requests within a specified time frame. Another commenter, opposed to an application process, stated that NCUA should set a clear standard so that FCUs could determine their own incidental powers. This commenter also suggested that FCUs could seek a legal opinion from NCUA if necessary. The Board has adopted an approach in the proposed regulation that adopts many of these comments. The proposed regulation provides for regulatory approval to identify additional incidental powers activities, recognizing the deference to which the NCUA as regulator is entitled in making this determination. The Board believes that regulatory identification of permissible activities provides assurance to FCUs that the activities in which they engage are legal.

The Board proposed retaining the current regulation's conflict of interest provisions. To provide clarity, the Board sought comment on possible definitions for the phrase "in conjunction with any activity." One commenter supported the current conflict of interest provision. Others commenting on this section offered various suggestions for amending this provision. One commenter stated that, where no conflict of interest exists, senior management should not be prohibited from receiving compensation from an FCU in conjunction with group purchasing. Another commenter suggested that, instead of defining the phrase, it should be eliminated from the regulation. Five commenters also suggested that, under certain conditions, the regulation permit senior

management officials to receive bonuses or incentives for overseeing group purchasing activities.

The proposed rule deletes the phrase "in conjunction with" and replaces it with the phrase "in connection with." This will make the provision consistent with other NCUA conflict of interest provisions that use the phrase "in connection with," such as the lending regulation. 12 CFR 701.21(c)(8). To address the confusion about the application of the conflict of interest provision, the section by section analysis that follows provides an example illustrating the kind of compensation that is permissible.

C. Overview of the Proposed Regulation

1. The Incidental Powers Authority

The legal authority for the activities covered by part 721 is the incidental powers provision of the Federal Credit Union Act (FCU Act). 12 U.S.C. 1757(17). That provision states that an FCU may "exercise such incidental powers as shall be necessary or requisite to enable it to carry on effectively the business for which it is incorporated." 12 U.S.C. 1757(17). Over the years, NCUA has looked to whether an activity is convenient or useful to the credit union's business as expressly authorized by the FCU Act when determining if an activity is authorized. NCUA's position has been based on *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972). This case established a test for determining the incidental powers of national banks and was applied to FCUs in *American Bankers Association v. Connell*, 447 F. Supp. 296 at 298 (D.D.C. 1978).

Recently, the U.S. Supreme Court expanded the incidental powers of national banks in *Nationsbank of North Carolina v. Variable Annuity Life Insurance Co.* (VALIC), 513 U.S. 251 (1995). The Court found that the powers of national banks are not limited to those activities enumerated in 12 U.S.C. 24 (Seventh), and that banks have the authority to carry on the business of banking as provided in that section. The Court deferred to the OCC's finding that the brokerage of financial investment instruments and the sale of investment products, such as annuities, are authorized as part of, or incidental to, the business of banking. *Id.* at 259. In evaluating the case, the Court stated:

We expressly hold that the "business of banking" is not limited to the enumerated powers in section 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated. The exercise of the Comptroller's discretion, however, must be kept within reasonable bounds. Ventures

distant from dealing in financial investment instruments—for example, operating a general travel agency—may exceed those bounds.

Id. at 259, n. 2.

After considering VALIC and the cases and OCC interpretations that have evolved since the VALIC case was decided, the Board recognizes that it, like the OCC, has the discretion under the incidental powers provision to authorize activities beyond those enumerated in the FCU Act. The Board believes that it may adopt a broader, more flexible analysis of those activities that fall within an FCU's incidental powers than it has used in the past.

The Board believes that the incidental activities of FCUs have evolved and must continue to evolve as a result of changes in the enumerated powers in the FCU Act and the impact of modern technology on how FCUs deliver financial services to their members. Congress, since the creation of the federal charter in 1934, has seen fit to amend the FCU Act many times, expanding the express powers of FCUs in various areas, including the types of accounts FCUs may offer, the types of lending and the permissible maturities for loans, and permissible investments, including the ability of FCUs to invest in credit union service organizations that support the operations of the credit unions they serve. As a result, the exercise of incidental powers, necessary for FCUs to carry on the business for which they are incorporated, has expanded. In addition, the Board is very aware of the significant impact that changing media has had on how businesses operate. Particularly, electronic communication has changed dramatically the nature and delivery of financial services. As a result, the exercise of incidental powers must expand to enable FCUs to deliver financial services through the use of modern media.

The Board does not believe it is necessary to link an incidental power directly to an express power enumerated in the FCU Act but generally will consider an activity to be within an FCU's incidental powers if it is "necessary or requisite to enable it to carry on effectively the business for which it is incorporated." 12 U.S.C. 1757(17). The Board believes the business of FCUs is to provide financial services to their members as contemplated by the FCU Act.

In determining whether an activity is authorized as an appropriate exercise of an FCU's incidental powers, the Board will consider: (1) Whether the activity is convenient or useful in carrying out the

mission or business of credit unions consistent with the Federal Credit Union Act; (2) whether the activity is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and (3) whether the activity involves risks similar in nature to those already assumed as part of the business of credit unions. In reviewing whether an activity is within an FCU's incidental powers, the Board is adopting criteria that are substantially similar to those used by the OCC but notes that those criteria will be applied in the unique context of credit unions and the business for which they are incorporated. Thus, while the Board may look to other laws and precedents in the financial industry for guidance in this area, the results of the Board's analysis may be different.

2. Other Considerations

The Board acknowledges that the proposed regulation will permit FCUs to engage in some activities that may have been traditionally performed by credit union service organizations (CUSOs). For example, both FCUs and CUSOs may offer income tax preparation. The Board continues to believe that CUSOs provide a good vehicle for providing services to credit unions and their members while protecting federal credit unions from increased liability. In addition, CUSOs are a means for FCUs to pool their resources and establish an operation for products or services that a single FCU would not be able to support on its own.

D. Section by Section Analysis

Section 721.1 What does this part cover?

This section describes the scope of part 721.

Section 721.2 What is an incidental powers activity?

This section establishes a definition for an incidental powers activity by using a three prong test. NCUA will determine whether an activity is within the incidental powers of FCUs if the activity: (1) Is convenient or useful in carrying out the mission or business of credit unions consistent with the Federal Credit Union Act; (2) is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and (3) involves risks similar in nature to those already assumed as part of the business of credit unions.

Section 721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

Proposed § 721.3 establishes categories of activities that the Board has determined to be within an FCU's incidental powers. It is not intended to be exhaustive and the regulation provides a mechanism for approving additional activities. Each of the categories is discussed briefly in this preamble.

Certification Services

The Board proposes that various certification services, such as notary services, electronic signature authentications and signature guarantees, are within the incidental powers of an FCU.

The provision of notary services has been an exercise of an FCU's incidental powers for many years. A notary administers oaths, verifies the identity of a signer, attests to the verification, records signatures, and authenticates commercial transactions. By providing notary services to members, an FCU facilitates transactions for its members that require the certification of signatures. This service allows for timely processing of credit union transactions as compared with sending members elsewhere for notarizations. Therefore, this service is convenient and useful in carrying out an FCU's business by allowing it to operate efficiently and effectively.

Similarly, the Board proposes that the authentication of electronic signatures is analogous to notarization. Like a notary, a certification authority (CA) must verify the identity of the signer and authenticate the signature or electronic equivalent. While state notary laws impose identification standards, a CA contractually agrees to the extent of its investigation before issuing a particular grade of an authentication certificate.

In a conditional approval, the OCC found that the CA activity is the functional equivalent of notary and other authentication services provided by banks, and a logical outgrowth of bank identification and verification skills. OCC Conditional Approval No. 267 (January 1998). The risks borne by an FCU acting as a CA are similar to a notary's improper verification and are similar to those risks inherent in providing electronic services. The OCC approval was conditioned upon an acceptable information systems and operations architecture, as well as OCC supervision of vendor services. *Id.* FCUs capable of providing this advanced service must employ technological and

legal risk controls to address safety and soundness considerations.

FCUs, as eligible guarantor institutions, are permitted to issue signature guarantees for the transfer of securities. 17 CFR 240.17Ad-15. NCUA has maintained for many years that FCUs could engage in the guarantee of stock transfer signatures for their members as a free, goodwill service. The Board now proposes that FCUs may provide signature guarantees for stock transfers and U.S. Treasury transactions, as provided by law, because this activity is an incidental power.

An FCU, acting as a signature guarantor, warrants three conditions: (1) That the signature is genuine; (2) that the signer is appropriately authorized to perform the act; and (3) that the signer has legal capacity to sign. A signature guarantor warrants the authority of the signer, rather than simply the genuineness of the signature. Nevertheless, this activity is fundamentally identity verification and is the functional equivalent or logical outgrowth to the provision of notarial services. Like notary services, this activity conveniently facilitates members' financial transactions.

Correspondent Services

Correspondent services have been an exercise of an FCU's incidental powers for many years. This authority allows a credit union that is authorized to perform a service for its members to provide the same services to other credit unions. For example, a credit union may engage in loan processing for another credit union.

Electronic Financial Services

The Board proposes that FCUs may offer, through electronic means and facilities, any activity, function, product or service that they are otherwise authorized to provide under their express or incidental powers. FCUs may establish their own web sites to promote credit union services and to effect member transactions, such as electronic bill payment, bill presentment, account inquiries and transfers. Web sites have become the electronic equivalent of newsletters, office signs and teller services. They provide a convenient and useful means for FCUs to carry out their business.

Through a transactional web site, an FCU may advertise and communicate with its members and others within its field of membership. Features, such as electronic bill payment and bill presentment, allow members to schedule payments and complete transactions without handwritten drafts or visits to the credit union. As noted by

the OCC, the risks confronted in providing financial services over the Internet are similar to the risks associated with the permissible activities of providing these services via electronic means generally. OCC Interpretive Letter No. 742 (August 1996). Accordingly, there are security issues that FCUs must address to manage risks involved in providing these services.

As part of the electronic delivery of traditional products or services, the Board believes FCUs have the authority under their incidental powers to engage in new activities or services due to the changing commercial environment, such as Internet access. By providing Internet access services to its members, an FCU offers its members a device to receive electronic products and services from the FCU. It also assures the FCU that members will access the credit union's home page when they initially connect to the Internet, positioning the credit union to market its products successfully. Members using the FCU's Internet access and transactional web site can retrieve account information and process transactions similarly to services offered by tellers, automated teller machines or telephone response systems.

Excess Capacity

The Board recognizes that, in planning for future expansion and offering new products and services to their members, FCUs should be able to sell their excess capacity as a matter of good business practice. The sale of excess capacity offers FCUs the opportunity to provide financial services to its members, even though member demand for the services does not initially meet the FCU's capacity. The opportunity to sell excess capacity may involve leasing excess office space, sharing employees, or using data processing systems to process information for third parties. As the business of FCUs is to provide financial services to their members, the Board believes that the sale of excess capacity is within an FCU's incidental powers under two conditions: (1) The FCU properly established the service or made the investment in good faith with the intent of serving its members; and (2) the FCU reasonably anticipates that the excess capacity will be taken up by the future expansion of services to its members.

Financial Counseling Services

Credit unions have traditionally been an alternative for moderate and low-income savers. As nonprofits, they serve to foster the financial well being of their

members rather than being driven by achieving corporate profits. The Board believes that, as part of providing credit and saving opportunities for their members, FCUs have the responsibility of promoting provident planning through consumer education and responsible investment. The Board believes it is part of the business of FCUs to provide financial counseling services to their members including estate planning, income tax preparation and filing, and investment and retirement counseling.

Finder Activities

The Board proposes to consolidate group purchasing and insurance activities in part 721 under the category entitled finder activities. Finder activities are defined as the promotion of products and services offered by outside vendors. As a finder, an FCU may introduce to or otherwise bring together outside vendors with its members for the negotiation and consummation of transactions through its role as a financial service provider and intermediary of financial services.

The Board believes that finder activities are member services that are necessary or requisite to enable FCUs to carry on their business effectively. FCUs can serve as their members' primary financial institution by bringing members together with providers of services and products. Although the FCU does not act as a broker, the FCU may negotiate group discounts or benefits on behalf of its membership with vendors. Additionally, these referrals enhance the quality of service FCUs offer their members and afford the FCU the opportunity to promote its own products as well. Examples of finder activities include placing third party vendor advertisements in the FCU's newsletter or as a link to the vendor's web site on the FCU's home page.

In establishing the category of finder activities, the Board is proposing to incorporate activities that FCUs previously have performed as group purchasing activities. In the past, group purchasing plans have been an opportunity for a third party vendor to market its products or services directly to credit union members through various promotional means, such as statement stuffers or advertisements displayed at credit union branches. Currently, part 721 specifically authorizes FCUs to endorse third party vendors and perform administrative functions on their behalf. 12 CFR 721.1. As part of securing an FCU's endorsement, third party vendors typically have provided discounts or other additional benefits to an FCU's

members. If FCUs engage in finder activities, the Board believes that FCUs should continue, as they have in the past in providing group purchasing opportunities, to enhance the economic well-being of their members by securing discounts or other benefits for their members from third party vendors.

Marketing

This section states that credit union management can use its longstanding incidental power to advertise and market its services in any legally permissible manner.

Monetary Instruments

This section allows a credit union to sell and exchange monetary instruments for its members. Among other things, it allows credit union to maintain deposits in foreign financial institutions to facilitate member transactions. However, this provision does not allow a credit union to maintain foreign deposits for speculative purposes.

Operational Programs

The Board is proposing to identify certain operational programs as within an FCU's incidental powers. This is not an exclusive list and other programs may be authorized through the legal opinion process. The Board is requesting comment on whether additional programs should be stated in this section or whether this section should be broadened to encompass a wider scope of permissible activities.

Stored Value Products

The Board proposes to identify stored value products or alternate media as within an FCU's incidental powers. As noted in an OCC decision, these products represent a member's prepayment for a merchant's goods or services and are, therefore, a form of bill payment. OCC Interpretive Letter No. 718 (April 1996). A credit union simply transfers funds from a member's share account to a merchant's account. The credit union acts as an intermediary by transferring funds from a member to a merchant, a traditional role for FCUs. Therefore, the activity poses no more additional risk than that already assumed by credit unions.

Trustee or Custodial Services

Although FCUs do not have express trust powers under the FCU Act, they have long served as trustees and custodians where that authority has been granted under other provisions of law such as the Internal Revenue Code. Under this authority, FCUs are able to provide individual retirement accounts (IRA), education saving accounts such

as the Roth IRA, and other savings opportunities that are of importance to modest savers. The ability of FCUs to provide these saving opportunities to their members fits within the role of FCUs as encouraging thrift among their members and creating a source of credit for provident purposes.

Section 721.4 How may a credit union apply to engage in an activity that is not preapproved as within a credit union's incidental powers?

Proposed § 721.4 allows FCUs to seek approval from NCUA to engage in an activity that is not within the ambit of the broad categories set forth in § 721.3. However, before FCUs engage in the petition process they should seek advisory opinions from NCUA's General Counsel, as to whether a proposed activity fits into one of the authorized categories or is otherwise within an FCU's incidental power. If NCUA's Office of General Counsel finds that the activity is not within the scope of the regulation set forth in § 721.3, an FCU wishing to conduct the activity should submit an application by certified mail, return receipt requested, to the Secretary of the Board describing the proposed activity in detail, including the requested activity's financial and operational impact on FCUs. NCUA will endeavor to respond to the applicant within 60 days as to whether it will propose an amendment. The application is treated as a petition to amend § 721.3. Because the addition of a new activity to the list is a substantive change in the regulation, the requirements of the Administrative Procedure Act must be followed.

Paragraph (c) of this section addresses what the Board will consider in determining whether a new activity should be included in the regulation.

This procedure is similar to the one found in § 712.7 for the addition of permissible services for credit union service organizations (CUSOs). The Board originally adopted this procedure in the CUSO regulation in 1986, but FCUs have not found the need to petition for an amendment of this rule. 51 FR 10360 (March 26, 1986). The categories in the current CUSO rule are fairly broad. The Board believes that the proposed categories of activities in proposed § 721.3 are drafted broadly enough to encompass many activities and that the petition process will rarely, if ever, be used.

Section 721.5 What limitations apply to a credit union engaging in activities approved under this part as within a credit union's incidental powers?

This section acknowledges the distinction between an FCU's authority to engage in an activity deemed to be within its incidental powers and the requirement that an FCU comply with any conditions or regulations that apply to the activity. When engaging in an authorized activity, FCUs must comply with conditions or constraints on the activity established in applicable federal and state law, NCUA regulations and legal opinions.

For example, FCUs are responsible for ensuring their compliance with applicable state licensing laws relating to insurance sales. Another example is the use of raffles in promotional activities that may be regulated or prohibited under local law. The regulation does not preempt FCUs from compliance with these laws.

Section 721.6 May a credit union derive income from activities approved under this part?

The proposed regulation provides that an FCU may receive compensation from its incidental power activities because these activities are deemed necessary or requisite for an FCU to carry on its business effectively. This includes charging fees to vendors that solicit members with products and services.

Section 721.7 What are the potential conflicts of interest for official and senior management employees when credit unions engage in activities approved under this part?

The proposed regulation defines a senior management employee, official, and immediate family member similarly to other conflict of interest provisions in NCUA regulations, such as those in the lending regulation. 12 CFR 701.21(c)(8).

The proposed regulation, again consistent with other NCUA regulations, prohibits a senior management employee, official, or his or her immediate family member from receiving any compensation or benefit, directly or indirectly, from activity that is covered by the regulation. The Board wishes to clarify that this section only prohibits compensation that is linked to products or services provided by third party vendors.

The Board does not prohibit compensation from the above named persons by a third party vendor if the compensation is: (1) Fixed in amount; (2) not related to the amount of products sold or services used; and (3) received by no more than one director or official

of the credit union, who is recused from the credit union decision concerning its business with the third party vendor. This type of arrangement does not present the type of conflict that would cause NCUA safety and soundness concerns. The following example of compensation that is not prohibited by the Board may prove helpful. A federal credit union official, Ms. Smith, is also on the board of directors of Company DMH, which sells phone cards. Ms. Smith is paid \$5,000 a year by Company DMH for her services as a director. The credit union contracts with Company DMH to provide prepaid phone cards to its members. Ms. Smith is not involved in the decision making process, and her compensation from the DMH Company is not linked to the credit union's phone card sales. Under this type of scenario, there is no conflict of interest and the compensation paid by DMH Company is not prohibited.

Finally, proposed § 721.7 allows employees, who are not senior management employees or officials, to receive incentives, provided the FCU's board of directors maintains a policy on the program and determines that no conflict exists.

Regulatory Procedures

Paperwork Reduction Act

NCUA has determined that the proposed regulation does not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This proposed rule, if adopted, will apply only to federally-chartered credit unions. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that the proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed rule is understandable and minimally intrusive if implemented as proposed.

List of Subjects in 12 CFR Part 721

Credit unions.

By the National Credit Union Administration Board on November 16, 2000.

Becky Baker,

Secretary of the Board.

For the reasons set forth in the preamble, it is proposed that 12 CFR chapter VII be amended as follows:

Part 721 is revised to read as follows:

PART 721—INCIDENTAL POWERS

Sec.

721.1 What does this part cover?

721.2 What is an incidental powers activity?

721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

721.4 How may a credit union apply to engage in an activity that is not preapproved as within a credit union's incidental powers?

721.5 What limitations apply to a credit union engaging in activities approved as within a credit union's incidental powers?

721.6 May a credit union derive income from activities approved under this part?

721.7 What are the potential conflicts of interest for officials and senior management employees when credit unions engage in activities approved under this part?

Authority: 12 U.S.C. 1757(17), 1766 and 1789.

§ 721.1 What does this part cover?

This part authorizes a federal credit union (you) to engage in activities incidental to your business as set out in this part. This part also describes how interested parties may request a legal opinion on whether an activity is within a federal credit union's incidental powers or apply to add new activities or categories to the regulation.

§ 721.2 What is an incidental powers activity?

An incidental powers activity is one that is necessary or requisite to enable you to carry on effectively the business for which you are incorporated. An activity meets the definition of an incidental power activity if the activity:

(a) Is convenient or useful in carrying out the mission or business of credit unions consistent with the Act;

(b) Is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and

(c) Involves risks similar in nature to those already assumed as part of the business of credit unions.

§ 721.3 What categories of activities are preapproved as incidental powers necessary or requisite to carry on a credit union's business?

The categories of activities in this section are preapproved as incidental to carrying on your business under § 721.2. The examples of incidental powers activities within each category are provided in this section as illustrations of activities permissible under the particular category, not as an exclusive or exhaustive list.

(a) *Certification services.* Certification services are services whereby you attest or authenticate a fact for your members' use. Certification services may include such services as notary services, signature guarantees, certification of electronic signatures, and share draft certifications.

(b) *Correspondent services.* Correspondent services are services you provide to other credit unions that you are authorized to perform for your members or as part of your operation. These services may include loan processing, member check cashing services and automated teller machine deposit services.

(c) *Electronic financial services.* Electronic financial services are any services, products, functions, or activities that you are otherwise authorized to perform, provide, or deliver to your members but performed through electronic means. Electronic services may include online transaction processing through a web site, web site hosting services, and Internet access services to perform or deliver products or services to members.

(d) *Excess capacity.* Excess capacity is the excess use or capacity remaining in facilities, equipment, or services that you have acquired or developed in good faith in the furtherance of your operations. You may sell or lease the excess capacity in facilities, equipment or services such as office space, employees and data processing.

(e) *Financial counseling services.*

Financial counseling services means advice, guidance or services that you offer to your members to promote thrift or to otherwise assist members on financial matters. Financial counseling services may include income tax preparation service, electronic tax filing for your members, counseling regarding estate and retirement planning, and investment counseling.

(f) *Finder activities.* Finder activities are activities in which you introduce or otherwise bring together outside vendors with your members so that the two parties may negotiate and consummate transactions. Finder activities may include offering third-party products and services to members through the sale of advertising space on your web site, account statements and receipts, or selling statistical or consumer financial information to outside vendors to facilitate the sale of their products to your members. Finder activities also include the offering of insurance products or agreements that cover credit disability, life savings, mechanical breakdown, debt cancellation, debt suspension, or loan protection.

(g) *Marketing activities.* Marketing activities are the activities or means you use to promote the products and services you offer to your members. Marketing activities may include advertising and other promotional activities such as raffles, membership referral drives, and the purchase or use of advertising.

(h) *Monetary instrument services.* Monetary instrument services are services that enable your members to purchase, sell, or exchange various currencies. These services may include the sale and exchange of foreign currency and U.S. commemorative coins. You may also use accounts you have in foreign financial institutions to facilitate your members' transfer and negotiation of checks denominated in foreign currency.

(i) *Operational programs.* Operational programs are programs that you establish within your business to establish or deliver products and services that enhance member service and promote safe and sound operation. Operational programs may include electronic funds transfers, remote tellers, point of purchase terminals, debit cards, payroll deduction, pre-authorized member transactions, direct deposit, check clearing services, safe deposit boxes, letters of credit, loan collection services, service fees, and collateral protection programs for improving repossessed collateral.

(j) *Stored value products.* Stored value products are alternate media to currency in which you transfer monetary value to the product and create a medium of exchange for your members' use. Examples of stored value products include stored value cards, public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, postage stamps, electronic benefits transfer script, and similar media.

(k) *Trustee or custodial services.* Trustee or custodial services are services in which you are authorized to act under any written trust instrument or custodial agreement created or organized in the United States and forming part of a pension or profit-sharing plan, as authorized under the Internal Revenue Code. These services may include acting as a trustee or custodian for member retirement and education accounts.

§ 721.4 How may a credit union apply to engage in an activity that is not preapproved as within a credit union's incidental powers?

(a) *Application contents.* To engage in an activity that may be within an FCU's incidental powers but not fall within a preapproved category listed in § 721.3, you may submit an application by certified mail, return receipt requested, to the NCUA Board. Your application must describe the activity, including your proposed investment in the activity and the financial and operational impact of the activity on you, your explanation, consistent with the test provided in paragraph (c) of this section, of why this activity is within your incidental powers, your plan for implementing the proposed activity, any state licenses you must obtain to conduct the activity, and any other information necessary to describe the proposed activity adequately. Before you engage in the petition process you should seek advisory opinions from NCUA's Office of General Counsel, as to whether a proposed activity fits into one of the authorized categories without filing a petition to amend the regulation.

(b) *Processing of application.* Your application must be filed with the Secretary of the NCUA Board. NCUA will review your application for completeness and will notify you whether additional information is required or whether the activity requested is permissible under one of the categories listed in § 721.3. If the activity falls within a category provided in § 721.3, NCUA will notify you that the activity is permissible and treat the application as withdrawn. If the activity does not fall within a category provided

in § 721.3, NCUA staff will consider whether the proposed activity is legally permissible. Upon a recommendation by NCUA staff that the activity is within a credit union's incidental powers, the NCUA Board may amend § 721.3 and will request public comment on the establishment of a new category of activities within § 721.3. If the activity proposed in your application fails to meet the criteria established in paragraph (c) of this section, NCUA will notify you within a reasonable period of time.

(c) *Decision on application.* In determining whether an activity is authorized as an appropriate exercise of a federal credit union's incidental powers, the Board will consider:

(1) whether the activity is convenient or useful in carrying out the mission or business of credit unions consistent with the Act;

(2) whether the activity is the functional equivalent or logical outgrowth of activities that are part of the mission or business of credit unions; and

(3) whether the activity involves risks similar in nature to those already assumed as part of the business of credit unions.

§ 721.5 What limitations apply to a credit union engaging in activities approved as within a credit union's incidental powers?

You must comply with any applicable NCUA regulations, policies, and legal opinions, as well as applicable state and federal law, if an activity authorized under this part is otherwise regulated or conditioned.

§ 721.6 May a credit union derive income from activities approved under this part?

You may earn income for those activities determined to be incidental to your business.

§ 721.7 What are the potential conflicts of interest for officials and senior management employees when credit unions engage in activities approved under this part?

(a) *Conflicts.* No senior management employee, official, or their immediate family member may receive any compensation or benefit, directly or indirectly, in connection with your engagement in an activity authorized under this part.

(b) *Commissions.* No employee, not otherwise covered in paragraph (a) of this section, may receive a commission, fee, or other similar compensation that is directly related to the sale of group purchasing or insurance products to your members, unless your board of directors determines that a conflict of interest does not exist and complies

with paragraph (d)(3) of this section when appropriate.

(c) *Business associates and immediate family members.* All transactions with business associates or immediate family members not specifically prohibited by paragraph (a) of this section must be conducted at arm's length and in the interest of the credit union.

(d) *Permissible payments.* This section does not prohibit:

(1) Payment, by you, of salary to your employees;

(2) Payment, by you, of an incentive or bonus to an employee based on your overall financial performance;

(3) Payment, by you, of an incentive or bonus to an employee, other than a senior management employee or paid official, in connection with an activity authorized by this part, provided that your board of directors establishes written policies and internal controls for the incentive program and monitors compliance with such policies and controls at least annually.

(e) *Definitions.* For purposes of this part, the following definitions apply.

(1) *Senior management employee* means your chief executive officer (typically, this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (e.g. Assistant President, Vice President, or Assistant Treasurer/Manager), and the chief financial officer (Comptroller).

(2) *Official* means any member of your board of directors, credit committee or supervisory committee.

(3) *Immediate family member* means a spouse or other family member living in the same household.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000-NE-30-AD]

RIN 2120-AA64

Airworthiness Directives; General Electric Company (GE) CF6-50 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This amendment proposes the adoption of a new airworthiness directive (AD) that applies to GE CF6-50 turbofan engines. This proposal would require removal of old high